MD ARIS ZAINAL ABIDIN

v.

SURUHANJAYA PASUKAN POLIS & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING MOTION NO: 25-3-1993]
22 SEPTEMBER 2003

ADMINISTRATIVE LAW: *Public servant - Disciplinary Proceedings - Inquiry - Duty of Appropriate Disciplinary Authority - Forms of punishment to be considered - Public Officers (Conduct & Discipline) General Orders (Cap D) 1980*

ADMINISTRATIVE LAW: *Public servant - Dismissal - Dismissal of Police Inspector - Whether ultra vires - Whether proceedings adopted proper - Whether applicant deprived of lines of defence available to him - Whether maxim delegatus non potest delegare applicable*

The applicant, a Police Inspector in the Royal Malaysian Police, was charged with 3 charges under General Order 26 of the Public Officers (Conduct and Discipline) General Orders (Cap. D) (1980) with a view to dismissal only. The applicant replied to the charges but was nonetheless dismissed from service. The applicant averred that he had been wrongfully dismissed and therefore applied that he be reinstated to his post. *Inter alia* the applicant argued that: (i) the respondent should have brought the action under General Order 11 and not under General Order 26; (ii) the respondent's decision was *ultra vires*; and (iii) the maxim *delegatus non potest delegare* applied since the letter of dismissal was signed by a person unknown on behalf of the Penolong Ketua Urusetia, Ketua Polis Negara.

Held (allowing the application):

[1] The failure of the 1st respondent to proceed under the right General Order was tantamount to failing to take the preliminary step which the law regards as essential. (p 369 a-b)

[2] By failing to prefer a charge under General Order 11(2), the applicant had been deprived of the opportunity of addressing the lines of defences open to him under the said General Order 11. (p 368 c)

[3] Any act or conduct by the 1st respondent that restricted or appeared to restrict the applicant's ability to present his case in a manner that can best

give him an opportunity to exculpate himself, may be held to be a breach of procedural fairness and thereby warranting a judicial review. (p 368 f)

[4] There was a flaw in the decision-making process as facts clearly showed that the Appropriate Disciplinary Authority did not consider the other forms of punishment. This warrants the court's interference. (p 370 d)

[5] The Appropriate Disciplinary Authority ("ADA") was duty bound to amend its notice in writing or at least to inform the applicant that they would be considering alternative punishment as the applicant had brought to its attention that punishment other than dismissal ought to be considered. (p 371 g)

[6] Following *Marzuki Abdul Aziz v. Ketua Polis Negara & Anor*, although the actual name of the person signing had not been typed or printed, the Deputy Inspector General of Police who affirmed the affidavit had identified and named the person as an officer authorized by him to sign on his behalf. Therefore, the argument that the maxim *delegatus non potest delegare* ought to apply must fail. (p 375 a-b)

Case(s) referred to:

Council of Civil Service Unions & Other v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 ***(foll)***

Marzuki Abdul Aziz v. Ketua Polis Negara & Anor [2003] 3 CLJ 315 CA ***(foll)***

Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor [2002] 4 CLJ 10 CA ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor [1983] 2 CLJ 7 FC ***(refd)***

Mohanaraj Muniandy v. Pengarah Jabatan Perkhidmatan Haiwan & Anor [2002] 8 CLJ 682 HC ***(refd)***

Yap Jack Keet v. Ketua Polis Negara & Anor [2000] 7 CLJ 74 HC ***(refd)***

Legislation referred to:

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, GO. 11(1), (2), (3), (4), (5), (6), (7), 23, 24, 25, 26(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11)

Rules of the High Court 1980, O. 53 r. 1A

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

Facts

This suit is brought by the plaintiff who was, prior to his dismissal, an Inspector of the Royal Malaysian Police. He is claiming that the dismissal was unlawful for non-compliance with the rules of natural justice. On 1 December 1990, the plaintiff borrowed a sum of RM15,000 as a friendly loan without interest from one Dato' Tan Heng Chew, the Deputy Chairman of Tan Chong Motors Sdn Bhd, Kuala Lumpur. On 4 September 1992, the plaintiff received a letter signed by the Penolong Ketua Urusetia, KPN (Hj Ahmad Ragib bin Hj Mohd Salleh) on behalf of the TKPN (1st defendant) informing the plaintiff that the defendant, acting in pursuance of the powers delegated to him by the Suruhanjaya Pasukan Polis *vide* PU(B) 621 dated 19 December 1985 had decided to take disciplinary action against him under General Order 26 of the Public Officers (Conduct and Discipline) G.O. (Cap. D) (1980) with a view to dismissal only.

The plaintiff faced three charges which are reproduced herewith:

1st Charge:

> Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, pada masa itu bertugas sebagai Pegawai Penyelaras di Ibu Pejabat Daerah Polis Brickfields, Kuala Lumpur, telah didapati berkelakuan dengan sedemikian cara hingga menjatuhkan reputasi Perkhidmatan Awam, kerana gagal membayar semula 'friendly loan' sebanyak $15,000.00 yang dibuat pada 6/12/90 dari Datuk Tan Heng Chiew, Timbalan Pengerusi Syarikat Tan Chong Motors, Kuala Lumpur pada tarikh yang ditetapkan, di mana perbuatan demikian menyebabkan orang awam hilang kepercayaan kepada anda sebagai seorang Pegawai Awam hingga merujukkan perkara itu kepada Ketua atasan anda. Dengan yang demikian anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(d), Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') , 1980.

2nd Charge:

> Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, pada masa itu bertugas sebagai Pegawai Penyelaras di Ibu Pejabat Daerah Polis Brickfields, Kuala Lumpur, telah didapati Ingkar Perintah kepada HT/KPN A 207 di para 96 kerana tidak melapurkan kepada Pegawai Pemerintah anda, iaitu telah berhutang dalam keadaan kesusahan berat yang melebihi tiga kali emolumen bulanan anda, dimana telah membuat 'Friendly Loan' sebanyak $15,000.00 tanpa bercagar dari Datuk Tan Heng Chiew Timbalan

Pengerusi Syarikat Tan Chong Motors, Kuala Lumpur. Dengan yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah 'Am 4(2) (i), Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib)(bab 'D'), 1980.

3rd Charge:

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, yang bertugas di Ibu Pejabat Daerah Polis Alor Setar, Kedah Darul Aman, telah memungkiri janji kepada P.Pj.P. Ahmad Al Bakish, Timbalan Ketua Polis Kedah Darul Aman, di mana semasa dipanggil ke Pejabatnya pada 17/3/92 lebih kurang jam 0930, telah berjanji akan membuat pembayaran sebanyak $250.00 sebulan mulai April, 1992 sehingga selesai hutang anda sebanyak $15,000.00 kepada Datuk Tan Heng Chiew, yang mana hutang itu hanya dibayar mulai Mei, 1992 manakala Surat Undertaking itu diserahkan kepada Timbalan Ketua Polis Kedah pada 26/5/92. Dengan yang demikian, anda telah melakukan perlanggaran tatatertib di bawah Perintah 'Am 4(2)(f), Perintah-perintah Am, Pegawai Awam (Kelakuan dan Tatatertib)(Bab 'D'), 1980.

Plaintiff replied to the said charges but he was dismissed based on all the three charges. The letter of dismissal was signed by a person unknown, on behalf of Hj Ahmad Ragib Hj Mohd Salleh, the Penolong Ketua Urusetia KPN with the words 'AOL' written beside the name.

Findings Of The Court

This case has a chequered history. When the motion first came up for hearing, the learned Federal Counsel took a preliminary objection as to the jurisdiction of the court to hear the matter on the basis that the motion had been filed more than six weeks after the date of his dismissal which was on 28 December 1992, based on r. 1A of O. 53 of the Rules of the High Court 1980. The whole of that order has since been replaced *vide* PUA 342/2000 which came into force on 22 September 2000. Relying on the decision of *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54, the learned trial judge who heard the motion, dismissed it.

In allowing the appeal, the Court of Appeal in *Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor* [2002] 4 CLJ 10 CA held that it was contrary to the rules of natural justice to require the applicant to make his application for leave for certiorari within six weeks from the date of a decision, since the decision to dismiss the Appellant was made on 28 December 1992 but was only communicated to him on 16 January 1993. The Court of Appeal said at p. 17 as follows:

In our considered judgment r. 1A should be read harmoniously with art. 5(1) of the Federal Constitution. When this is done the words "...after the date of the proceedings" must fall to be interpreted so that time runs from the date the decision was communicated to the appellant.

Since there was no further appeal to the Federal Court the matter has now come before me.

Procedural Defects

The first issue taken by the applicant is to attack the procedure adopted by the 1st respondent. It was the case of the applicant that instead of proceeding under G.O. 26, the applicant ought to have proceeded under G.O. 11.

It is therefore necessary to reproduce both these G.O.s. Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, G.O. 26(1):

(11) reads as follows:

26. (1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determine, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission: Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion:

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.

G.O. 11(1)-(7) reads as follows:

11. (1) For the purpose of these General Orders the expression "serious pecuniary indebtedness" means the state of an officer's indebtedness which, having regard to the amount of debts incurred by him, has actually caused serious financial hardship to him; and without prejudice to the general meaning of the said expression, an officer shall be deemed to be in serious pecuniary indebtedness:

(a) Where the aggregate of an officer's unsecured debts and liabilities at any given time exceeds the sum of three times his monthly emoluments;

(b) where he is a judgment debtor and the judgment debt has not been settled within one month of the date of the judgment; or

(c) where he is a bankrupt or an insolvent wage earner, as the case may be, for so long as any judgment against him in favour of the Official Assignee remains unsatisfied.

(2) Serious pecuniary indebtedness from whatever cause other than the result of unavoidable misfortune not contributed to in any way by the officer himself shall be regarded as bringing the public service into disrepute and shall render him liable to disciplinary action.

(3) If serious pecuniary indebtedness which has occurred is the result of unavoidable misfortune, the Government may give the officer such assistance as the circumstances appear to warrant.

(4) If an officer finds that his debts cause or are likely to cause serious pecuniary indebtedness to him, he shall forthwith report this fact to the Head of Department.

(5) An officer who fails or delays in reporting his serious pecuniary indebtedness or who reports the same but fails to disclose its full extent or gives false or misleading account thereof, shall be guilty of a serious breach of discipline (whatever the first cause of the indebtedness may be), and shall render himself liable to disciplinary action.

(6) As long as an officer is in serious pecuniary indebtedness he may be disqualified for promotion or acting in a higher appointment or covering another post in addition to his duties.

(7) Where an officer's debts amount to serious pecuniary indebtedness but he has not been adjudged a bankrupt or an insolvent wage earner, his case shall be reviewed annually by the Head of Department.

At the outset it was made easier for this court by the agreement of both counsel that the "misconduct" of the applicant with reference to G.O. 26 was his "failure to pay" the loan. There was also the agreement that there was no corrupt practice involved since the loan was a mere friendly loan.

Encik Ismail for the applicant pointed out that where there is a specific provision of the G.O. under which the applicant could have been charged, namely, G.O. 11 which dealt with 'serious pecuniary indebtedness", the 1st respondent was wrong in electing to proceed under G.O. 26 which specifically dealt with "unsatisfactory work" or "misconduct". Further, it was argued that since there was no complaint regarding the applicant's work, the generalisation of the word "misconduct" to apply to "borrowing money" and being unable to pay, is inappropriate. Scores of decided cases have illustrated what misconduct is. To name a few, refusing to follow superior's orders, accepting bribes, fighting, showing indiscipline and the examples can go on. But in the General Orders 1980 there is a specific provision that deals with a case of serious pecuniary indebtedness.

It was argued by learned Senior Federal Counsel that by being unable to pay his debt, the applicant had brought disrepute to the government and is therefore guilty of misconduct. If this line of argument is to be accepted then almost every government servant who has taken loans and had defaulted for one reason or the other, can be guilty of a charge of breaching G.O. 26. Government servants acceptedly earn less than employees of similar rank in the private sector. Many a reason can occasion a default in payment. In any case if such was the intent as argued by the learned Senior Federal Counsel then surely the charge could have been framed under G.O. 11(2) which provided that if the officer by his indebtedness brought the public service to disrepute, he could be liable for disciplinary action.

However if the applicant had been charged under G.O. 11(2) then the 1st respondent would have had to establish that the applicant was in "serious pecuniary indebtedness" as defined in G.O. 11(1).

Then the provision of G.O. 11(2) also gives the applicant a defence. He could be entitled to show that such "serious pecuniary indebtedness" had occurred as a result of "unavoidable misfortune not contributed to in any way by him". He would have been allowed to address this line of defence and to focus his attention to show that the indebtedness was unavoidable.

Then again if he was able to show such a line of defence, G.O. 11(3) would have come into play. The government saw it fit to defend and assist its employees who found themselves in such situations. It is obvious that by failing to prefer a charge under 11(2), the applicant had been deprived of the opportunity of addressing the lines of defences open to him under G.O. 11.

In *Council of Civil Service Unions & Others v. Minister for the Civil Service* [1984] 3 All ER 935 HL, the House of Lords held that administrative action is subject to control by judicial review under three heads:

(1) illegality, where the decision-making authority has been guilty of an error of law, e.g. by purporting to exercise a power it does not possess;

(2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision;

(3) procedural impropriety, where the decision making authority has failed in its duty to act fairly.

It is axiomatic that any act or conduct by the 1st respondent that restricted or appeared to restrict the applicant's ability to present his case in a manner that can best give him an opportunity to exculpate himself, may be held to be a breach of procedural fairness and thereby warranting a judicial review. And whether there has been such a breach can be ascertained by examining the facts such as in this case where the applicant was inhibited from being able to explain if he was suffering from "serious pecuniary indebtedness".

In this context, I draw to mind the salutary warning of the then Supreme Court in *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333 SC which said at p. 345 as follows:

> In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.

In the circumstances, it is plain that the 1st respondent ought to have proceeded pursuant to G.O. 11 and not G.O. 26. Finally I can do no better than to refer to the decision of the House of Lords in *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278 which held that where an employer failed to take the

preliminary steps which the law regarded as essential, he had no power to dismiss, and any purported dismissal was a nullity. Applying this rationale to the case before me, the failure of the 1st respondent to proceed under the right G.O. was in my view, tantamount to failing to take the preliminary step which the law regards as essential.

Ultra Vires

The disciplinary procedures relating to this case can be said to be governed by G.O. 23, 24, 25 & 26. It is therefore necessary to reproduce G.O. 23, 24 & 25 since G.O. 26 has already been earlier reproduced.

> 23. In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard:
>
> Provided that this General Order shall not apply to the following cases:
>
> (a) Where the Appropriate Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this General Order; or
>
> (b) Where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this General Order.
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> 24. In every case of an alleged breach of discipline by any officer except as provided for under General Order 27(a) and (b), the Chairman of the Appropriate Disciplinary Authority shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether the breach of discipline complained of is a nature which merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.
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> 25. (1) Where the Chairman of the Appropriate Disciplinary Authority decides under General Order 24 that the breach of discipline alleged merits punishment lesser than dismissal or reduction in rank, the officer shall be informed in writing of the facts of the breach of discipline alleged against him and be given an opportunity of making a representation in writing, against the allegation.
>
> (2) After considering the representation under paragraph (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.

It is clear from G.O. 23 that the applicant shall not be dismissed or **reduced in rank** (emphasis provided) unless he had been informed in writing of the grounds under which it is proposed that action be taken against him. Whilst the applicant herein had been duly notified in writing of the charges he was to face by a letter dated 4 September 1992 and signed by the Penolong Ketua Urusetia KPN (Tatatertib) a relevant portion of the said letter needs to be reproduced. It reads:

> Adalah saya diarah memaklumkan bahawa Timbalan Ketua Polis Negara, pada menjalankan kuasakuasa yang telah diwakilkan kepadanya oleh Suruhanjaya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/85, telah memutuskan untuk mengambil tindakan tatatertib terhadap anda di bawah Perintah 'Am 26, Perintah-perintah 'Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') , 1980. Representasi telah dibuat kepada Timbalan Ketua Polis Negara di atas sikap tidak bertanggungjawab anda. Timbalan Ketua Polis Negara berpendapat bahawa sikap anda tersebut wajar dikenakan hukuman 'Buang Kerja'.

This clearly showed that the Appropriate Disciplinary Authority (ADA) did not consider, the other form of punishment it had to consider, namely "reduction in rank". The ADA was so fixated with the view of only considering dismissal that it had failed to give any consideration at all to the punishment of a possible reduction in rank.

I say fixated because in his affidavit in reply to this application, the then Timbalan Ketua Polis Negara, Tan Sri Abd Rahim bin Mohd Noor (TKPN), averred that pursuant to the powers given to him by the Police Commission as the Timbalan Ketua Polis Negara, he had the authority in disciplinary proceedings to "menahan kerja, menggantung kerja dan mengenakan tindakan buang kerja ke atas Pegawai Kanan Polis yang tertentu sebagaimana yang didefinasikan di dalam statut, termasuklah pegawai yang berpangkat Inspektor".

It is clear from this paragraph that the TKPN was aware that statutorily this applicant must be given the opportunity of being considered for the alternate punishment. Whilst he accepts that he is bound by the statute, clearly he has omitted to mention that the statute, by virtue of G.O. 23, G.O. 24, G.O. 25 & G.O. 26 has fixed as an alternative punishment, namely reduction in rank. The TKPN has stated that he had the power to suspend an employee. Obviously he must have relied on G.O. 24 which gives him the right to consider dismissal, or reduction in rank, **or a punishment lesser than dismissal or reduction in rank** (emphasis added).

As to his concession that the G.O. is regulated by statute, this view has been given judicial approval (see *Ghazi bin Mohd Sawi supra*, and *Yap Jack Keet v. Ketua Polis Negara & Anor* [2000] 7 CLJ 74 at 83).

However although he concedes that the statutory provisions that govern the G.O. allows him to consider alternate punishment, in his affidavit he refers to only one punishment for the applicant, that is dismissal. He says as follows:

> Saya telah berpuas hati bahawa Pemohon telah melakukan suatu salah laku yang pada pendapat saya boleh dikenakan hukuman buang kerja di bawah Perintah-perintah Am itu."

He goes on further to say:

> ... saya setelah memberi pertimbangan terhadap representasi Pemohon dengan teliti dan saksama, saya pada 21.12.1992 telah berpuas hati dan berkeputusan bahawa Pemohon telah gagal membebaskan dirinya dari kesemua alasan-alasan tindakan tatatertib yang dikemukakan terhadapnya dan seterusnya hukuman buang kerja terhadap Pemohon telah dijatuhkan.

What is unacceptable about this decision is that in his representation made in response to the three charges preferred against him, the applicant himself had pleaded that he be not dismissed but be given alternative punishment. This is what he said:

> Saya bersedia menerima hukuman dan saya mohon kepada Yang Berbahagia Tan Sri supaya saya jangan ditamatkan daripada perkhidmatan kerana saya tidak ada mempunyai cara lain untuk mencari nafkah bagi menanggung anak isteri dan tanggungan saya. Dengan saya dibuang kerja masalah yang saya hadapi ini tidak akan selesai malahan akibat dan angkubahnya akan berterusan, seterusnya keluarga dan tanggungjawab saya akan turut terlibat dalam kancah masalah ini. Sekali lagi saya merayu kepada Yang Berbahagia Tan Sri supaya saya diberi lagi satu peluang untuk memperbaiki diri dan keadaan ini relalah saya menerima hukuman kecuali dibuang kerja.

Since the applicant himself had brought to the attention of the ADA that punishment other than dismissal ought to be considered, the ADA was duty bound to have, at that stage, amended its notice in writing or at least to inform the applicant that they would be considering alternative punishments. Instead the ADA totally disregarded the applicant's plea and proceeded to consider only dismissal.

Finally it must be pointed out that G.O. 36 states that the disciplinary authority may impose on an officer any one or any combination of two or more of the following punishment:

(a) warning;

(b) reprimand;

(c) fine;

(d) forfeiture of salary;

(e) stoppage of increment;

(f) deferment of increment;

(g) reduction of salary;

(h) reduction in rank;

(i) dismissal.

It is obvious that in this case there was flaw in the decision-making process that warrants this court's interference.

In *Chai Kok Choy v. Ketua Polis Negara & Ors* [2002] 4 MLJ 364 in dealing with a similar situation, this is what I said:

> It is clear from the Regulations that gives the disciplinary authority the power to sit in judgment over the plaintiff that it must consider whether each of the breaches complained of merited a punishment of dismissal or reduction in rank and that it is incumbent on the said disciplinary authority to consider all the available information, and after such consideration, if it appears to the said disciplinary authority that such information clearly presented a prima facie case against the plaintiff, then the plaintiff could either be dismissed or reduced in rank. In this case, the disciplinary authority's focus was only on dismissal. In doing so, clearly the disciplinary authority had acted ultra vires its powers as contained in general order 28(1).
>
> The disciplinary authority had no power to prejudge on the charges and decide for itself that the charges merited only the punishment of dismissal. Having taken such a one-sided view, the disciplinary authority could not be said to be unbiased. Having made its decision that the plaintiff was entitled only to an acquittal or to the draconian punishment of dismissal without considering the alternative punishment of reduction in rank, the disciplinary authority has clearly not complied with general order 38 whereby it could have had the choice of any one of seven punishments for consideration. In *Inspector-General of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260, the Federal Court held that as the show cause letter did not direct the respondent's attention to the possibility of the punishment of reduction in rank, it had not sufficiently complied with the requirement under para (2) of the old General Orders Chapter D 30.

Also in *Mohanaraj Muniandy v. Pengarah Jabatan Perkhidmatan Haiwan & Anor* [2002] 3 MLJ 558 where the plaintiff was put in a similar predicament without the Public Services Commission considering the alternative lesser punishment of reduction in rank and only considering dismissal, I held that since there was no requirement for the Public Services Commission to give any reasons, it was all the more incumbent upon the Public Services Commission to have expressed in no uncertain terms and in clear precise language that it had considered both punishments and that the facts demanded the punishment of dismissal and none other. By its dismissal letter, the Public Services Commission had failed to state if it had also considered the lesser alternative punishment and this amounted to a failure in the decisionmaking process. Coming to the case before me, it is my judgment therefore that even on this ground the applicant must succeed.

Bias

On 8 April 1992 the Timbalan Ketua Polis Kedah Darulaman wrote to the Ketua Polis Negara that he had explained to the applicant the contents of two letters dated 10 March 1992 and 30 March 1992 and that the applicant had agreed to settle the loan in instalments of RM250 per month commencing from April 1992. However on 23 May 1992, the applicant wrote to the Timbalan Ketua Polis Kedah Darulaman that because of the month of Syawal, he was unable to start payment in April but that he would pay from May. This letter was titled **Undertaking to settle the debt**. However Dato' Tan Heng Chew, the lender wrote to the applicant a letter dated 10 December 1992 in which he returned two Postal Orders for RM250 each on the basis that the period to cash it had expired with a request to issue two fresh postal orders. The letter also stated that this was not in tune with the agreement entered into between themselves on 1 January 1992 and the applicant was requested to take the appropriate action. Now what is interesting to note is that this Dato' Tan had carbon copied this letter to Tuan Haji Mohd Said Awang, the Ketua Polis Daerah Kedah Darulaman and also to the Pengarah Pentadbiran, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur, for the attention of one Dato' Hj Ahmad Ragib.

It is the applicant's complaint before me that since he had agreed with Dato' Tan, who incidentally was at that time the Deputy Manager of Tan Chong Motors, that he would effect payment by monthly RM250 payments, Dato' Tan could have proceeded by due process of law to obtain the sum loaned, instead of complaining to the Ketua Polis Kedah Darulaman. Further the applicant pointed out that Dato' Tan had not even demanded the loan in writing. I must also add that whilst Dato' Tan had stated in his letter dated 10 December 1992, that there was an arrangement for the payment of the loan between him and the applicant, he had not by a letter or an affidavit, explained what that

arrangement for the payment, was to have been. The applicant averred in his affidavit that the said Dato' Tan was a good friend of one Dato' Hj Ahmad Ragib the Penolong Ketua Urusetia KPN (Tatatertib) and who had signed the dismissal letter and had made use of their relationship to exert pressure and cause the setting up of the disciplinary proceedings against him. In respect of this averment, Tan Sri Rahim Noor who filed the reply affidavit had stated that he had no personal knowledge of this allegation. Besides, Dato' Hj Ahmad Ragib himself did not file any affidavit to rebut this allegation.

The applicant's case is that there was unnecessary pressure exerted upon him and that he was also made to give an undertaking to settle the loan.

Notwithstanding the fact that there has been no reply affidavit to counter the applicant's contention that Dato' Tan knew Dato' Hj Ahmad Ragib and had therefore exploited that relationship and through him had obtained the help of the Timbalan and the Ketua Polis Daerah Kedah Darulaman to extract an undertaking from him to settle, I am unable to agree with the applicant on this issue. There is no actual evidence that pressure had been exerted. I find that the Timbalan and the Ketua Polis Daerah Kedah Darulaman had in fact been advising the applicant to resolve the payment of the loan as had the Ketua Polis Negara. I find no substance of bias.

Delegatus Non Potest Delegare

It is the applicant's case that the dismissal letter was not signed by the Timbalan Ketua Polis Negara or by his authorised officer, Dato' Hj Ahmad Ragib bin Hj Mohd Salleh, the Penolong Ketua Urusetia KPN (Tatatertib). The signature is a scribble with the word 'for' placed before Dato' Hj Ahmad Ragib bin Hj Mohd Salleh and with the handwritten letters AOL which I take to mean 'Absent On Leave'.

In *Marzuki Abdul Aziz v. Ketua Polis Negara & Anor* [2003] 3 CLJ 315, the Court of Appeal held that whilst the Deputy Inspector General of Police has the power to initiate disciplinary proceedings and to impose the required punishment, however the working and signing of both the show cause and dismissal letters by someone else was not fatal since the signing by someone else was not part of the decision-making process of the Deputy Inspector General of Police, but that the signing by someone else was a mere administrative action or function more so when the letter began with the words "Saya diarahkan ...". Further in the case before me although the actual name of the person signing had not been typed or printed, the Deputy Inspector General of Police, Tan Sri Abdul Rahim bin Mohd Noor who affirmed the affidavit had identified the person as Johar bin Che' Din a Police Officer, authorised by him to sign on his behalf. To my mind this affidavit is sufficient

and with the binding precedent of the case of *Marzuki*, the argument of the applicant that the maxim *delegatus non-potest delegare* (a delegate cannot further delegate the power to someone else) ought to apply, must fail. It is not Dato' Hj Ahmad Ragib bin Hj Mohd Salleh who delegated the authority to Johar to sign. It was the Deputy Inspector General of Police himself who authorised Johar to sign.

After considering all the arguments, I find that the applicant had been wrongly dismissed. I therefore order that the applicant be reinstated in the Police Force in his former position and to accrue all benefits todate. The applicant would also be entitled to such promotions that he would have received to date if not for the dismissal.

The applicant will also have the costs.